ARY
SUPREME COURT, U.S. 71 - 420

Supreme Court, U.S.
FILED
SEP 23 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

DOCKET NO.

WEST MORRIS REGIONAL BOARD OF EDUCATION,
a municipal corporation of the State of New Jersey,

Petitioner,

vs.

ARTHUR J. SILLS, Attorney General of the State of New Jersey; CARL L. MARBURGER, Commissioner of Education of the State of New Jersey; THE NEW JERSEY STATE BOARD OF EDUCATION; ABRAM A. VERMEULEN, Director Division of Budget and Accounting of the State of New Jersey; JOHN A. KERVICK, Treasurer of the State of New Jersey; LESLIE P. REAR, Superintendent of Schools of Morris County, New Jersey; and THE BOARD OF EDUCATION OF THE TOWNSHIP OF MORRIS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY

PETITION FOR WRIT OF CERTIORARI

GARRET A. HOBART, IV,
Attorney for Petitioner, West Morris Regional Board of Education

A Member of the Firm of
SCHENCK, PRICE, SMITH & KING,
10 Washington Street,
Morristown, New Jersey 07960

Newark, N. J. (201) 623-7224 | N. J. Appellate Printing Co., Inc. Law Printers | Woodbridge, N. J. (201) 636-2030

TABLE OF CONTENTS

Page

Petition for Writ of Certiorari to the Supreme Court of New Jersey 1

Opinion Below 2

Jurisdiction 2

Questions Presented 3

Constitutional Provisions and Statutes Involved 4

Statement of the Case 7

Reasons for Granting the Writ 10

I. The Establishment of Religion Argument 10

II. The Equal Protection Argument 11

Conclusion 12

Appendix A

Opinion of the Supreme Court of New Jersey 1a

Appendix B

Opinion of the Superior Court of New Jersey, Chancery Division—Morris County 22a

Appendix C

Order of Judgment 47a

CASES CITED:

Earley v. DiCenso, — U.S. — (1971) 3

Everson v. Board of Education, 330 U.S. 1 (1947) 3, 7, 10

TABLE OF CONTENTS

Page

CASES CITED:

Lemon v. Kurtzman,
— U.S. —, 29 L. Ed. 2d 45 (1971) 3, 10

Walz v. Tax Commission,
397 U.S. 664 (1970) 10

West Morris Regional Board of Education v. Arthur J. Sills, et al.,
110 N.J. Super. 234 (Ch. Div. 1970); *aff'd*, 58 N.J. 464 (1971) 2

STATUTES CITED:

N.J.S.A. 18A:39-1 et seq. 2, 4, 7

CONSTITUTIONS CITED:

28 U.S.C. §1257(3) 2

U.S. Const.,
Amend. I 4
Amend. XIV 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

DOCKET NO.

WEST MORRIS REGIONAL BOARD OF EDUCATION, a municipal corporation of the State of New Jersey,

Petitioner,

vs.

ARTHUR J. SILLS, Attorney General of the State of New Jersey; CARL L. MARBURGER, Commissioner of Education of the State of New Jersey; THE NEW JERSEY STATE BOARD OF EDUCATION; ABRAM A. VERMEULEN, Director Division of Budget and Accounting of the State of New Jersey; JOHN A. KERVICK, Treasurer of the State of New Jersey; LESLIE P. REAR, Superintendent of Schools of Morris County, New Jersey; and THE BOARD OF EDUCATION OF THE TOWNSHIP OF MORRIS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Petitioner, West Morris Regional Board of Education, a municipal corporation of the State of New Jersey, with principal offices at Chester, New Jersey (07930), respect-

fully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of New Jersey entered June 25, 1971, which judgment affirmed in part and reversed in part a decision of the Superior Court of New Jersey, Chancery Division, reported at 110 N.J. Super. 234 (Ch. Div. 1970), which judgment denied Petitioner's contention that the New Jersey Law providing for busing of private and parochial school students at public expense (*N.J.S.A.* 18A:39-1 *et seq.*) violates the establishment of religion clause of the First Amendment to the United States Constitution and the equal protection clause of the Fourteenth Amendment to the United States Constitution. A copy of that judgment is appended as Appendix "A" hereto. A copy of the Court's opinion is appended as Appendix "B" hereto.

OPINION BELOW

The opinion of the Supreme Court of the State of New Jersey is reported at 58 N.J. 464 (1971). A copy of that opinion is appended as Appendix "C" hereto.

JURISDICTION

The judgment of the Supreme Court of the State of New Jersey is a final judgment of the highest Court of that State. The jurisdiction of this Court is invoked under 28 U.S.C., § 1257 (3).

QUESTIONS PRESENTED

1. Does a State Statute which compels local school districts to bus private and parochial school students to private and parochial schools within a radius of twenty miles of the school district at public expense, or in the alternative, to pay $150.00 to the parents of such children where the busing cost exceeds $150.00 per annum tend towards the establishment of religion in violation of the First Amendment to the United States Constitution?

2. Should *Everson v. Board of Education*, 330 U.S. 1 (1947) be overruled in light of this Court's recent decision in *Earley v. DiCenso*, — U.S. — (1971), and *Lemon v. Kurtzman*, — U.S. —, 29 L.Ed.2d 45 (1971)?

3. Does a school busing statute whose purported purpose is to insure the safety of children in going to and from school create a denial of the equal protection of the laws under the Fourteenth Amendment to the United States Constitution when it denies the benefits of the Act to all private and parochial students who reside in school districts who do not bus public students?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const., Amend. I:

> "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; . . ."

U.S. Const., Amend. XIV:

> "No State shall make or enforce any law which shall * * * deny to any person within its jurisdiction the equal protection of the laws."

N.J.S.A. 18A:39-1:

> "Whenever in any district there are pupils residing remote from any schoolhouse, the board of education of the district may make rules and contracts for the transportation of such pupils to and from school, including the transportation of school pupils to and from school other than a public school, except such school as is operated for profit in whole or in part.
>
> "When any school district provides any transportation for public school pupils to and from school pursuant to this section, transportation shall be supplied to school pupils residing in such school district in going to and from any remote school other than a public school, not operated for profit in whole or in part, located within the State not more than 20 miles from the residence of the pupil provided the per pupil cost of the lowest bid received does not exceed $150.00 and if such bid shall exceed said cost then the parent, guardian or other person having legal custody of the pupil shall be eligible to receive said amount toward the cost of his transportation to a qualified school other than a public school, regardless of whether such transportation is along established public school routes. It shall be the obligation of

the parent, guardian or other person having legal custody of the pupil attending a remote school, other than a public school, not operating for profit in whole or in part, to register said pupil with the office of the secretary of the board of education at the time and in the manner specified by rules and regulations of the State board in order to be eligible for the transportation provided by this section. If the registration of any such pupil is not completed by September 1 of the school year and if it is necessary for the board of education to enter into a contract establishing a new route in order to provide such transportation then the board shall not be required to provide it, but in lieu thereof the parent, guardian or other person having legal custody of the pupil shall be eligible to receive $150.00 or an amount computed by multiplying $0.8333 times the number of school days remaining in the school year at the time of registration, whichever is the smaller amount. Whenever any regional school district provides any transportation for pupils attending schools other than public schools pursuant to this section, said regional district shall assume responsibility for the transportation of all such pupils, and the cost of such transportation for pupils below the grade level for which the regional district was organized, shall be prorated by the regional district among the constituent districts on a per pupil basis after approval of such cost by the county superintendent. This section shall not require school districts to provide any transportation to pupils attending a school other than a public school where the only transportation presently provided by said district is for school children transported pursuant to chapter 46 of this Title or for pupils transported to a vocational, technical or other public school offering a specialized program. Any transportation to a school, other than a public school, shall be pursuant to the same rules and regulations promulgated by the State board as governs transportation to any public school.

"Nothing in this section shall be so construed as to prohibit a board of education from making contracts for the transportation of pupils to a school in an adjoining district when such pupils are transferred to the district by order of the county superintendent, or when any pupils shall attend school in a district other than that in which they shall reside by virtue of an agreement made by the respective boards of education.

"Nothing herein contained shall limit or diminish in any way any of the provisions for transportation for children pursuant to chapter 46 of this Title."

STATEMENT OF THE CASE

Petitioners, Plaintiffs below, are the West Morris Regional Board of Education, a regional high school district responsible for public high school education in the Townships of Mendham, Chester, Mount Olive and Washington, and the Boroughs of Mendham and Chester, all of which are located in Morris County, New Jersey, and several individual Plaintiffs who are presently, or were members of that Board of Education, and two individual tax payers. Petitioners brought suit in the Superior Court of New Jersey, Chancery Division, Morris County, against the Attorney General of the State of New Jersey,[1] the New Jersey Commissioner of Education, and other State and local officials responsible for the administration of *N.J.S.A.* 18A:39-1, the New Jersey School Busing Law. By complaint, a copy of which is appended hereto as Exhibit D, Petitioners sought injunctive relief and a declaratory judgment that *N.J.S.A.* 18A:39-1, as amended by the New Jersey Legislature in 1967 and 1968 violated the establishment clause of the First Amendment and the equal protection clause of the Fourteenth Amendment of the United States Constitution.

In support of its First Amendment attack below, Petitioners asserted that the 1967 and 1968 amendments to the New Jersey School Busing Law were unconstitutional and went beyond the area of permissible activities sanctioned by *Everson v. Board of Education*, 330 U.S. 1 (1947), which upheld the constitutionality of the Statute prior to its recent amendment. It was contended that the busing of children to school up to twenty miles dis-

---

[1] At the time of the commencement of the action, New Jersey's Attorney General was the Defendant, Arthur J. Sills. George F. Kugler, Jr. is now the Attorney General.

tant from the boundary of the public school district, given the fact that over 90% of those schools are run by the Roman Catholic Church, confers a primary benefit on the school and not on the child being transported. It was further contended that the creation of separate bus routes to private and parochial schools relieved those schools of the administrative expense and the duty of running bus routes, thereby providing a direct benefit to religious institutions. The First Amendment argument was rejected both by the trial court and by the Supreme Court of New Jersey.

With regard to equal protection, Petitioners' argued below that, although the New Jersey Legislature avowed that its purpose in enacting the 1967 and 1968 amendments was child safety for all of the children of New Jersey, the law contains at least six areas of under-inclusion that amount to irrational and discriminatory classification proscribed by the equal protection clause of the Fourteenth Amendment. The six cases excluded from the benefits of either a bus ride or a $150.00 grant are:

(a) children travelling to profit making schools,

(b) children travelling to schools outside the State of New Jersey,

(c) students living outside the twenty mile radius,

(d) pupils living in districts which only transport handicapped children,

(e) students living in districts which only transport children attending public vocational schools, and

(f) private or parochial non-profit school pupils residing in a district which provides transportation to its public schools.

The trial Court found that the first five of the listed exclusions met the test of rational classification but agreed with Petitioners that the sixth class of exclusions created invidious discrimination against the students who most need transportaton for both safety and economic reasons, since the State Commissioner and Board of Education have ruled that children living more than two miles (K-8) or 2.5 miles (9-12) from school must be bused, and since the districts which do not bus public school children tend to be the compact urbanized areas usually populated by lower income families. The Respondents took an appeal to the Superior Court, Appellate Division, which appeal was certified directly by the New Jersey Supreme Court on its own motion pursuant to local rule. The Supreme Court of New Jersey affirmed the trial Court on the First Amendment issue and reversed on the Fourteenth Amendment issue, holding that the New Jersey Legislature acted rationally in creating the six classes of exclusions cited above. This Petition ensued.

REASONS FOR GRANTING THE WRIT

Petitioners respectfully submit that the within case raises constitutional issues of signficant importance which should be decided by the Supreme Court of the United States.

I.

The Establishment of Religion Argument

In *Everson v. Board of Education*, 330 U.S. 1 (1947), Mr. Justice Black, writing the majority opinion, suggested that the decision carried to "the very verge" of forbidden territory under the Religion Clauses. Petitioners contend that the amendments to the New Jersey Statute go beyond the verge in several respects, namely (1) The New Jersey Act provides for actual operation of bus routes by the public school boards to schools which may be located outside the bundary of the school district. Hence, the local school boards are now providing services which directly benefit the parochial school by relieving them of bus contracts and the added administrative costs. As in *Lemon v. Kurtzman*, — U.S. —, 29 L.Ed.2d 45 (1971), and its companion cases, over 90% of the schools benefitted are affiliated with the Roman Catholic Church, most of the supporters of the Legislation, as substantiated by the record below, were of the Roman Catholic faith, and the evil forseen by Mr. Chief Justice Berger in his majority opinion in *Lemon v. Kurtzman, supra*, of a political polarization along religious lines may ensue. We respectfully submit that the case at bar would provide the Court with a suitable vehicle to determine where the line is to be drawn in cases which fall between *Walz v. Tax Commission*, 397 U.S. 664 (1970) and *Lemon v. Kurtzman, supra*.

II.

The Equal Protection Argument

We respectfully submit that the case at bar presents an equal protection issue of the highest importance, namely, may a state in passing Legislation purportedly designed to advance child safety exclude from the benefits of the law those persons perhaps most in need of its benefits. The record below indicates that the children who will receive neither a bus ride nor a grant under the present New Jersey Law are, for the most part, concentrated in urban areas and come from low income families who cannot provide private transportation to non-public schools. We respectfully submit that a statutory scheme of classification that employs a "triggering device" based on the distance a non-benefited group (the public students) has to travel to school without consideration of the need for transportation of the benefited group (private and parochial students) does not meet the standard of rational classification dictated by the equal protection clause.

CONCLUSION

For the foregoing reasons, Petitioner prays that its Petition for a Writ of Certiorari be granted.

Repectfully submitted,

/s/ Garret A. Hobart, IV
GARRET A. HOBART, IV
Attorney for Petitioner, West Morris Regional Board of Education

A Member of the Firm of
Schenck, Price, Smith & King, Esqs.
10 Washington Street
Morristown, New Jersey 07960

APPENDIX A

Opinion of the Supreme Court of New Jersey

West Morris Regional Board of Education, *Et Al.*, Plaintiffs-Respondents, Cross-Appellants, v. Arthur J. Sills, *Et Al.*, Defendants-Appellants Cross-Respondents.

Argued April 26, 1971—Decided June 25, 1971.

SYNOPSIS

Action for declaration that a statute providing for free transportation of children to private schools was unconstitutional. The Superior Court,, Chancery Division, found that the statute did not violate the establishment clause of the church-state provision of the First Amendment but found that equal protection was violated, 110 *N. J. Super.* 234. Defendants appealed and plaintiffs cross-appealed. The Supreme Court, Weintraub, C. J., held that equal protection was not violated.

Reversed and matter remanded for entry of judgment for defendants.

1. Schools and school districts 19(1)

Where pupil transportation program did not involve perpetual fund for support of free public schools, it did not violate constitutional provision mandating that income from such fund be appropriated to support of free public schools for equal benefit of all people of state. *Const.* 1947, *Art.* VIII, § IV, *par.* 2; *N. J. S. A.* 18A:39–1.

2. Schools and school districts 8

Where purpose of constitutional provision was to make it clear that legislature may transport students to private schools, phrase "within reasonable limitations as to distance to be prescribed" was restriction upon amount of transportation which may be furnished rather than prescription

of single basis on which beneficiaries of transportation program may be determined, and such provision did not invalidate statute authorizing local education boards to make rules and contracts for transportation of pupils residing "remote" from any schoolhouse, not only to public schools, but also to private schools, subject to certain exceptions. *Const.* 1947, *Art.* VIII, § IV, *par.* 3; *N. J. S. A.* 18A:39–1.

3. Constitutional law 84

Schools and school districts 8

Statute authorizing local boards of education to make rules and contracts for transportation of pupils "remote" from any schoolhouse, not only to public schools, but also to private schools was measure to aid student rather than school, and purpose and primary effect were not to advance religion, and statute did not violate First Amendment ban of any law respecting establishment of religion. *U. S. C. A. Const. Amend.* 1; *N. J. S. A.* 18:A39–1.

4 Constitutional law 211

Principle that equal protection clause does not require statewide uniformity in all things applies to education, and education is so much matter of local concern that school districts may be established *Const.* 1947, *Art.* VIII § IV, *par.* 1; *U. S. C. A. Const. Amend.* 14.

5. Constitutional law 211

Equal protection clause of Fourteenth Amendment does not require equality of local appropriations for education. *U. S. C. A. Const. Amend.* 14; *Const.* 1947, *Art.* VIII, § IV, *par.* 1.

6. Constitutional law 225(1)

Absent invidious discrimination, identical statewide treatment of school pupils by legislature itself in exercise of its discretion is not required by equal protection clause. *N. J. S. A.* 18A:33–1, 39–1; *U. S. C. A. Const. Amend.* 14.

7 Constitutional Law 225(1)

Schools and school districts 8

Legislature did not violate equal protection by extending to private school student right to transportation on same basis on which transportation would be available if he attended public school in his district, i. e., remoteness from school, though some districts had no remote public school students and thus remote nonpublic school students in such districts received no public transportation. *N. J. S. A.* 18A:33–1, 33–2, 38–25, 39–1, 39–1.1, 58–7; *U. S. C. A. Const. Amend.* 14.

8. Constitutional law 38

So long as limited objective is not invidious in design or effect, statute may be invalidated merely because it would also be reasonable to do more. *N. J. S. A.* 18A:39–1; *U. S. C. A. Const. Amend.* 14.

9. Constitutional law 48

Where there was nothing before court to indicate that there were students attending out-of-state private schools and students attending schools for profit, who would come within pupil transportation statute but for its exclusions, court would not anticipate attack on statute on their behalf nor assume that their exclusion could not be justified or, if it could not, that statute would fall on such account *N. J. S. A.* 18A:39–1; *U. S. C. A. Const. Amend.* 14.

10. Constitutional law 211

Schools and school districts 159½

It was not unreasonable, and therefore not denial of equal protection, for pupil transportation statute to exclude students traveling beyond 20-mile radius or to provide limit of $150 upon cost of transporting one student. *N. J. S. A.* 18A:39—1; *U. S. C. A. Const. Amend.* 14.

11. Constitutional law 211

Schools and school districts 8

It was not necessary, for equal protection, that legislature treat all private school students on par with the handicapped student for purpose of providing transportation. *N. J. S. A.* 18A:39—1, 46—23; *U. S. C. A. Const. Amend.* 14.

12. Constitutional law 211

Schools and school districts 8

Legislature in enacting pupil transportation statute could rationally deem vocational students a separate class, absent showing to the contrary, and equal protection did not require that private school students who lived in districts which transported children to vocational schools be on such account given transportation. *N. J. S. A.* 18A:39—1, 46—23; *U. S. C. A. Const. Amend.* 14.

Mrs. Virginia Long Annich, Deputy Attorney General, argued the cause for defendants-appellants, cross-respondents (*Mr. George F. Kugler, Jr.*, Attorney General of New Jersey, attorney).

Mr. Garret A. Hobart, IV, argued the cause for plaintiffs-respondents, cross-appellants (*Messrs. Schenck, Price, Smith and King*, attorneys).

Mr. Arnold H. Chait argued the cause for defendant-appellant, cross-respondent The Board of Education of The

Township of Morris (*Messrs. Vogel, Chait and Wacks*, attorneys).

OPINION

The opinion of the Court was delivered by

WEINTRAUB, C. J. [1] Plaintiffs sought a declaration that a statute providing for free transportation of children to private schools was unconstitutional. The principal attack was two-fold: (1) that the statute violated the establishment clause of the church-state provision of the First Amendment to the Constitution of the United States, and (2) that the statute discriminated arbitrarily among pupils attending private schools, in violation of the equal protection clause of the Fourteenth Amendment. The trial court found against plaintiffs as to the establishment issue, but for them with respect to their equal protection complaint. The trial court also placed its decision on two additional grounds which we find untenable and which require but passing mention.[1] *West Morris Regional Board of Education, Morris County v. Sills*, 110 *N. J. Super.* 234 (Ch. Div. 1970).

Defendants appeal and plaintiffs cross-appeal. The cross-appeal seeks no modification of the judgment itself; rather the object is to place the result upon the more pervasive thesis that the church-state provision bars free public transportation to parochial schools. We certified the matter before argument in the Appellate Division.

---

[1] The trial court found a violation of *Art.* VIII, § 4, ¶ 2, of the State Constitution which mandates that the income from the perpetual fund for the support of free public schools shall be "appropriated to the support of free public schools, for the equal benefit of all the people of the State." The parties agree that the finding cannot be sustained since the income from that fund is not involved in the transportation program. The other ground used by the trial court was that *Art.* VIII, § 4, ¶ 3, of the State Constitution permits classification of private school students with respect to transportation only upon the basis of distance. We will refer to that proposition later in this opinion.

The statute under attack is *N. J. S. A.* 18A:39–1.[2] It deals with pupils residing "remote" from any schoolhouse, and authorizes the local board of education to make rules and contracts for their transportation, not only to public schools, but also to private schools, subject, however, to certain exceptions. The equal-protection argument arises out of those exceptions. The church-state issue arises out of the fact that the required transportation includes transportation to parochial schools.

The statute has a relevant history. In an earlier form, it was upheld against the charge that it violated the establishment clause. *Everson v. Board of Education of Ewing Township*, 133 *N. J. L.* 350 (E. & A. 1945), affirmed, 330 *U. S.* 1, 67 *S. Ct.* 504, 91 *L. Ed.* 711 (1947). The statute then required that when a school district provides transportation for public school children living remote from any schoolhouse, it must also supply transportation "from any point in such established school route to any other point in such established school route" to school children residing in such school district "in going to and from school other than a public school, except such school as is operated

---

[2] The statute reads in full:

Whenever in any district there are pupils residing remote from any schoolhouse, the board of education of the district may make rules and contracts for the transportation of such pupils to and from school, including the transportation of school pupils to and from school other than a public school, except such school as is operated for profit in whole or in part.

When any school district provides any transportation for public school pupils to and from school pursuant to this section, transportation shall be supplied to school pupils residing in such school district in going to and from any remote school other than a public school, not operated for profit in whole or in part, located within the State not more than 20 miles from the residence of the pupil provided the per pupil cost of the lowest bid received does not exceed $150.00 and if such bid shall exceed said cost then the parent, guardian or other person having legal custody of the pupil shall be eligible to receive said amount toward the cost of his transportation to a qualified school other than a public school, regardless of whether such transportation is along established public school routes. It shall be the obligation

for profit in whole or in part." *R. S.* 18:14–8, as amended by *L.* 1941, *c.* 191. The local board of education there provided for transportation by reimbursing the parent of public school pupils for fares paid a common carrier. Obedient to the statute, the board also provided for reimbursement to parents of students who used the same bus routes in attending private schools, all which were operated by the Roman Catholic Church. The statute was upheld in *Everson* by a divided vote in our State court and by a vote of 5 to 4 in the United States Supreme Court.

After *Everson*, the subject was dealt with expressly in our State Constitution of 1947, to the end that the establishment clause of that Constitution, *Art.* I, ¶ 4, could not be construed to bar transportation for private school pupils. 1 *Constitutional Convention of 1947, Convention Proceedings, pp.* 704–726. The Constitution of 1947 accordingly provides, *Art.* VIII, § 4, ¶ 3:

> The Legislature may, within reasonable limitations as to distance to be prescribed, provide for the transportation of children within the ages of five to eighteen years inclusive to and from any school.

[2] We digress for a moment to deal with the question whether *Art.* VIII, § 4, ¶3, quoted immediately above,

---

of the parent, guardian or other person having legal custody of the pupil attending a remote school, other than a public school, not operating for profit in whole or in part, to register said pupil with the office of the secretary of the board of education at the time and in the manner specified by rules and regulations of the State board in order to be eligible for the transportation provided by this section. If the registration of any such pupil is not completed by September 1 of the school year and if it is necessary for the board of education to enter into a contract establishing a new route in order to provide such transportation then the board shall not be required to provide it, but in lieu thereof the parent, guardian or other person having legal custody of the pupil shall be eligible to receive $150.00 or an amount computed by multiplying $0.8333 times the number of school days remaining in

interdicts the statutory scheme here involved. As we mentioned in footnote 1, *supra*, the trial court found that the statute violated this provision. 110 *N. J. Super.* at 251 and 254. The thesis of that finding is that the phrase, "within reasonable limitations as to distance to be prescribed," sets forth the exclusive basis upon which the Legislature may differentiate or classify students. But the purpose of this constitutional provision being to make it clear that the Legislature may (but need not) transport students to private schools, the quoted phrase seems clearly to be a restriction upon the amount of transportation which may be furnished rather than a prescription of a single basis upon which the beneficiaries of a transportation program may be determined. Hence this section of the Constitution does not bear upon the issue in this case.

---

the school year at the time of registration, whichever is the smaller amount. Whenever any regional school district provides any transportation for pupils attending schools other than public schools pursuant to this section, said regional district shall assume responsibility for the transportation of all such pupils, and the cost of such transportation for pupils below the grade level for which the regional district was organized, shall be prorated by the regional district among the constituent districts on a per pupil basis after approval of such cost by the county superintendent. This section shall not require school districts to provide any transportation to pupils attending a school other than a public school where the only transportation presently provided by said district is for school children transported pursuant to chapter 46 of this Title or for pupils transported to a vocational, technical or other public school offering a specialized program. Any transportation to a school, other than a public school, shall be pursuant to the same rules and regulations promulgated by the State board as governs transportation to any public school.

Nothing in this section shall be so construed as to prohibit a board of education from making contracts for the transportation of pupils to a school in an adjoining district when such pupils are transferred to the district by order of the county superintendent, or when any pupils shall attend school in a district other than that in which they shall reside by virtue of an agreement made by the respective boards of education.

Nothing herein contained shall limit or diminish in any way any of the provisions for transportation for children pursuant to chapter 46 of this Title.

Returning to the history of the statute, we note that in *Fox v. Board of Education of West Milford Township*, 93 *N. J. Super.* 544 (Law Div. 1967), it was held that the statute did not authorize transportation to nonpublic school children other than along established public school routes. Thereupon, the Legislature adopted *L.* 1967, *c.* 74, which eliminated the "established school route" provision and directed that free transportation be given children attending a nonpublic school "not more than 20 miles from the residence of the pupil." [3] The statute was further amended by *L.* 1968, *c.* 29, to place a limit of $150 upon the sum to be paid for the transportation of a student attending a nonpublic school.

The statute as it presently stands was sustained in *McCanna v. Sills*, 103 *N. J. Super.* 480 (Ch. Div. 1968), against a charge that it violated the establishment clause of the First Amendment, and was sustained in *Board of Education of the Borough of Woodbury Heights v. Gateway Regional High School*, 104 *N. J. Super.* 76 (Law Div. 1968), against a charge that the statute discriminated against pupils in public schools in the circumstances of that case. Neither decision was appealed.

I

[2] As we have said, the trial court rejected plaintiffs' claim that the statute violates the First Amendment ban of any "law respecting an establishment of religion." We

---

[3] By way of explanation of the 20-mile limitation, we are told that 19.7 miles is the mean of the maximum distances from home to school "of the typical public school pupil – by county." We assume the Legislature adopted a fixed mileage criterion to avoid the administrative difficulties of individual determinations in implementing the legislative purpose to provide equivalent treatment of public and nanpublic school residing in districts which provide transportation for children who live remote from a schoolhouse. The reasonableness of the 20-mile figure is not attacked in this case.

agree with the trial court's treatment of that issue. The statute, in all respects relevant to that issue, is as it was when it was upheld in *Everson*.[4] It remains a measure to aid the student rather than the school he attends; its purpose and primary effect are not to advance religion.

Nor does it appear that the Supreme Court of the United States has withdrawn from the majority position in *Everson*. On the contrary, *Everson* was reaffirmed in *Board of Education of Central School Dist. No. 1 v. Allen*, 392 U. S. 236, 88 S. Ct. 1923, 20 *L. Ed.* 2d 1060 (1968), where the majority upheld a New York statute requiring local public school authorities to lend textbooks without charge to students attending public and private schools, including parochial schools.

II

We turn to the question whether the statute violates the equal protection clause of the Fourteenth Amendment. The trial court succinctly summarized plaintiffs' claim that the statute fails to include all the private school children who paintiffs say must be included, 110 *N. J. Super.* at 241:

> Plaintiffs assert that the operation of *N. J. S. A.* 18A:39–1 violates the Equal Protection Clause by reason of 'under-inclusion.' Plaintiffs cite six categories of school children who are excluded from transportation by reason of the operation of the act, to wit: (1) New Jersey residents attending out-of-state schools; (2) students outside the 20-mile radius; (3) pupils attending profit-making private schools; (4) pupils living in districts which only transport handicapped children

---

[4] In *Everson*, all the nonpublic school children in fact attending parochial schools, and that circumstance was noted in the opinions in that case. In the present case, parochial school students, although numerically the dominant beneficiaries of the statute, are not the sole private school beneficiaries.

pursuant to *N. J. S. A.* 18A:46–23; (5) students living in districts which only provide transportation to children attending public vocational schools, and (6) private or parochial non-profit school pupils residing in a district which provides no transportation to its public schools. Plaintiffs maintain that, by reason of these exclusions, the challenged act denies equal protection to pupils in the excluded categories.

The trial court rejected the first five criticisms. It concluded, however, that the sixth was correct, and upon that basis held that the statute is invalid and hence that transportation may not be provided any private school student. We will deal first with the equal protection charge the trial court upheld and then with the equal protection charges the trial court rejected.

The statute must be considered in the context of other legislation. Attendance at school is mandated with respect to children between the ages of 6 and 16, *N. J. S. A.* 18A:38–25. It having been held to be the constitutional right of a parent to choose to send the child to a private school, *Pierce v. Society of Sisters, etc.*, 268 *U. S.* 510, 45 *S. Ct.* 571, 69 *L. Ed.* 1070 (1925), a statute, *N. J. S. A.* 18A:38–25, permits a parent to seek equivalent instruction elsewhere. Thus children, whether attending a public or a private school, are pursuing a process of education mandated for them, at least between the ages of 6 and 16.

Although *N. J. S. A.* 18A:39–1, the statute have challenged, seems on its ace to leave it to each school district to decide whether to transport children living "remote" from a schoolhouse, defendants say the school district is obliged to do so by reaon of still another statute.[5] Defend-

[5] The correctness of defendants' position was not argued before us. Since it does not disadvantage plaintiffs to say the statutory scheme with respect to "remote" children is thus mandatory, we accept defendants' proposition that this is so.

ants refer to *N. J. S. A.* 18:33—1, which imposes upon each schol district the duty to provide "suitable educational facilities." The statute was considered in an earlier form in *Board of Education of Frelinghuysen Township v. Atwood*, 73 *N. J. L.* 315 (Sup. Ct. 1906), affirmed, 74 *N. J. L.* 638 (E. & A. 1907). The forerunner o *N. J. S. A.* 18A:39—1 was also then in existence; it authorized the school district to "make rules and contracts" for the transportation of children "living remote rom the school-house." It was held in the case just cited that the required "suitable school facilities" did not include transportation for children living remote from the schoolhouse. The Legislature thereupon amended that statute to include " "convenience of access" to the public schools among the "suitable school facilities" which the district was required to furnish. That amendment was held to require the school district to transport children living "remote from the school-house." *Board of Education of Township of West Amwell, etc. v. State Board of Education*, 5 *N. J. Misc.* 152, 135 *A.* 664 (Sup. Ct. 1927).

We note also that the local school board has no discretion with respect to whether a student lives "remote" from the schoolhouse. The Commissioner of Education and the State Board of Education have determined that an elementary student (K—8) cannot be expected to walk more than 2 miles to school, nor a high school student (9—12) more than 2.5 miles. "Remote" has thus been defined administratively. Hence school districts have been obliged to provide transportation to elementary and high school students residing beyond those distances from their assigned schools. The State contributes 75% of the cost of that transportation, *N. J. S. A.* 18A:58—7, and State aid will be withheld if the district fails to meet its obligation to

provide suitable educational facilities, including the required transportation. *N. J. S. A.* 18A:33–2. A school district may, but need not, provide transportation to pupils who do not live "remote" from a schoolhouse, but the cost is not included in calculating the amount of State aid for transportation of pupils. *N. J. S. A.* 18A:39–1.1.

To summarize for the purpose of the equal protection issue now under consideration, a school district must transport public school students living more than the stated distances from their assigned schools, and if such transportation is thus required, then the district must also provide transportation for students living within the district who attend a remote private school. Hence the private student will or will not receive transportation depending upon the district of his residence, *i e.*, whether statutes require transportation of public students living in his district. The statistics of the State Department of Education indicate that at the time of the trial below 106,000 remote nonpublic students were then being transported, while 14,000 such students, living in 97 districts which had no remote public school students, received no public transportation. This result, plaintiffs say, denies equal protection of the law, and the trial court agreed.

Plaintiffs contend that if the legislative purpose is to aid the child by getting him to school, on time, and safely (and child-benefit was the legislative objective accepted in *Everson* in rejecting the attack under the establishment clause), then there is no rational basis for conferring that benefit upon some students and not others. Plaintiffs do not go the length of suggesting this benefit could not be conferred solely upon public school students. Rather their aim is to bar transportation of all private school students, and they seek to do so upon the thesis we are now discuss-

ing, *i. e.*, that the statute must confer its benefit upon all private school students without regard to the district of their residence or upon none at all. Hence, plaintiffs say, transportation may not be granted to those private school students who live in school districts which furnish transportation to public schools and denied to those private school students who live in school districts which do not furnish transportation to public schools.

If there is substance to the proposition that all private school students must be treated as a single class without regard to the district of their residence, it is remarkable that it escaped counsel and the Court in *Everson*. There, it will be recalled, transportation was furnished (by way of cash reimbursement for fares paid to common carriers) to private school students but only along transportation routes established for public school students. The statute, then as now, limited the benefit to private school students who lived in districts which furnished transportation to public school students, and indeed the statute then differentiated between private school students even within a single district, extending its benefits only to those who used the public school route. Yet counsel in *Everson* asserted only the establishment issue, and although the majority of the Supreme Court on its own motion noted an equal protection problem, the problem so noted related only to discrimination among private school students on the basis of the attributes of the private schools they attended.[6] No

---

[6] In their footnote 2, the majority in *Everson* mentioned two equal protection problems, neither of which was pursued. One stemmed from the fact the defendant school district's resolution mentioned only *parochial* schools, and the other from the fact that the statute excluded private schools operated for profit. Those facts were probably noted because the dissenting opinions, in dealing with the establishment issue, stressed the omission in the resolution and the exclusion in the statute to emphasize their conviction that the program was intended to aid religion in violation of the establishment clause.

mention was made of the evident fact that the statute did not confer the same benefit upon all private school students without regard to the place of residence, even within a single district. Evidently no one thought that private students represented a single, statewide group entitled to be treated alike without regard to the district of residence or the treatment given public school pupils in the district of their residence.

At any rate plaintiffs' attack rests upon the central assumption that district lines are inherently irrelevant so that all private school students must receive identical treatment as among themselves. It, of course, is elementary that the equal protection clause does not require statewide uniformity in all things. Home rule necessarily runs the other way. If the subject is appropriate for local preference or decision, a statute may provide for local option or referendum. *Two Guys from Harrision, Inc. v. Furman*, 32 *N. J.* 199, 231–232 (1960); *Jamouneau v. Harner*, 16 *N. J.* 500, 517–521 (1954), *cert.* denied, 349 *U. S.* 904, 75 S. Ct. 580, 99 *L. Ed.* 1241 (1955); *Paul v. Gloucester County*, 50 *N. J. L.* 585, 608–609 (E. & A. 1888). See also *James v. Valtierra*, 402 *U. S.* 137, 91 *S. Ct.* 1331, 28 *L. Ed.* 2d 678 (1971); *Salsburg v. Maryland*, 346 *U. S.* 545, 552–553, 74 S. Ct. 280, 98 *L. Ed.* 281, 288–289 (1954); *Lloyd v. Dollison*, 194 *U. S.* 445, 24 *S. Ct.* 703, 48 *L. Ed.* 1062 (1904).

[4, 5] This basic principle applies to education. Thus it may be determined that education is so much a matter of local concern that school districts may be established. *Riccio v. Hoboken*, 69 *N. J. L.* 649, 653 (E. & A. 1903). Although our State Constitution mandates in *Art.* VIII, § 4, ¶ 1, that "The Legislature shall provide for the maintenance and support of a thorough and efficient system of

free public schools for the instruction of all the children in the State between the ages of five and eighteen years," it does not demand uniformity of result throughout the State.[7] *Landis v. School District* No. 44, 57 *N. J. L.* 509, 511–512 (Sup. Ct. 1894). Nor does the equal protection clause of the Fourteenth Amendment bar the creation of local school districts or require equality of local appropriations for education. *McInnis v. Shapiro,* 293 *F. Supp.* 327, 333, 336 (N. D. Ill. 1968), affirmed, 394 *U. S.* 322, 89 S. Ct. 1197, 22 *L. Ed.* 2d 308 (1969); *Burruss v. Wilkerson,* 310 *F. Supp.* 572 (W. D. Va. 1969), affirmed, 397 *U. S.* 44, 90 S. Ct. 812, 25 *L. Ed.* 2d 37 (1970); *Johnson v. New York State Education Department,* 319 *F. Supp.* 271 (E. D. N. Y. 1970). To the same effect, with respect to school transportation, see *Cartwright v. Sharpe.* 40 *Wis.* 2d 494, 162 *N. W.* 2d 5 (Sup. Ct. 1969). It, of course, would be another matter, if local option were designed for an invidious end, such as racial discrimination. See *Griffin v. County School Board of Prince Edward County,* 377 *U. S.* 218, 84 S. Ct. 1226, 12 *L. Ed. 2d* 256 (1964); *Hall v. St. Helena Parish School Board,* 197 *F. Supp.* 649(E. D. La. 1961), affirmed, 368 *U. S.* 515, 82 *S. Ct.* 529, 7 *L. Ed.* 2d 521 (1962); *Lee v. Nyquist,* 318 *F. Supp.* 710 (W. D. N. Y. 1970), affirmed, 402 *U. S.* – 91 S. Ct. 1618, 29 *L. Ed.* 2d 105 (1971); *Lackawanna v. Kennedy Park Homes,* 318 *F. Supp.* 669 (W. D. N. Y. 1970), affirmed, 436 *F.* 2d 108 (2 Cir. 1970), *cert.* denied, 401 *U. S.* 1010, 91 S. Ct. 1256, 28 *L. Ed.* 2d 546 (1971). The immediate point is that, at least as of now, Kurland, "Equal Educational Opportunity," 35 *U. Chi. L. Rev.* 583 (1968), there is no constitutional fiat that educational expenditures be identical for

---

[7] We of course do not anticipate the question whether the State statutory scheme may, because of local failures, become unequal to the constitutional promise and command.

all students throughout the State. Benefits may indeed depend upon the district of a student's residence.

[6] In the case at hand, the subject was not left to local option, for, as related above, we have accepted defendants' view that under *N. J. S. A.* 18A:33–1 the school district must transport "remote" public school students, as defined administratively, and that if such transportation is required, it follows that transportation must be furnished to the private school student in accordance with *N. J. S. A.* 18A:39–1. Thus the question is whether identical statewide treatment, which is not required if the legislative power is delegated for local decision, becomes a constitutional imperative because the Legislature itelf made the final decision. We see no reason thus to limit legislative discretion. See *Griffin v. County School Board of Prince Edward County, supra,* 377 *U. S.* at 230–231, 84 *S. Ct.* 1226, 12 *L. Ed.* 2d at 264–265; *Salsburg v. Maryland, supra,* 346 *U. S.* at 551–553, 74 *S. Ct.* 280, 98 *L. Ed.* at 288–289.

The basic legislative theme is apparent. Having required school districts to provide transportation to public school students, the Legislature decided to extend to the student who chooses to attend a remote private school the same transportation benefi which is provided within his school district for those who attend a remote public school. Thus the exercise of the constitutional right to elect to attend a private school is freed of a financial consequence, in this respect.

[7] The question is not whether the Legislature could have gone further and ordered transportation for all private school students who live remote from their private schools without regard to the treatment accorded to public school pupils within the distrcts of their residence. The Legisla-

ture may choose from among rational objectives. Here the Legislature chose to extend to the private school student a right to transportation on the same basis upon which transportation would have been available if he attended public school in his district, *i.e.*, remoteness from the school, and in that way to deal evenly with him and the public school student within that district. We see nothing irrational or invidious in this legislative concept, and the legislative choice is not made intolerable merely because another choice might also be reasonable. *Cf. Bailey v. Engelman*, 56 N. J. 54, 58–59 (1970).

The case comes readily within the principles recently restated in *Dandridge v. Williams*, 397 *U. S.* 471, 90 *S. Ct.* 1153, 25 *L. Ed.* 2d 491 (1970). That case involved the Federal Aid to Familis with Dependent Children (AFDC) program, under which federal funds are made available to States which choose to participate. Each State is free to set its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program. The equal protection issue was whether Maryland could fix an upper limit on the total amount of aid which any one family unit could receive. In sustaining the maximum provision, the Court said (397 *U. S.* at 485, 90 *S. Ct.* at 1161, 25 *L. Ed.* 2d at 501–502):

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." Lindsley v. National Carbonic Gas Co., 220 U. S. 61, 78, 31 S. Ct. 337, 340, 55 L. Ed. 369, 377. "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be,

and unscientific." Metropolis Theatre Co. v. City of Chicago, 228 U. S. 61, 69–70, 33 S. Ct. 441, 443, 57 L. Ed. 730, 734.

The Court continued (397 *U. S.* at 486–487, 90 *S. Ct.* at 1162, 25 *L. Ed.* 2d at 503):

> But the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. Lindsley v. Natural Carbonic Gas Co.., 220 U. S. 61, 31 S. Ct. 337, 55 L. Ed. 369. It is enough that the State's action be rationally based and free from invidious discrimination. The regulation before us meets that test.
>
> We do not decide today that the Maryland regulation is wise, that is best fulfills the relevant social and economic objectives that Maryland might ideally espouse, or that a more just and humane system could not be devised. Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court. The Constitution may impose certain procedural safeguards upon systems of welfare administration, Goldberg v. Kelly, 397 U. S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287. But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.

[8] The area within which the State may act to advance the public welfare is vast. The Legislature must have leeway in deciding whether to act, and if so, how far to go. It would disserve the public interest to say that the Legislature may take no step unless it goes the whole distance which constitutionally could be travelled. Especially is this true when the subject involves the expenditure of

public moneys. The competing demands are such that modest objectives must be allowed even though more pervasive ones would be welcome. So long as the limited objective is not invidious in design or effect, a statute may not be invalidated merely because it would also be reasonable to do more.

We therefore conclude that the statute does not deny equal protection of the laws because it provides transportation only to private school students who reside in districts which must furnish transportation to the public schools.

[9] As we noted earlier, the trial court rejected the other equal protection challenges. Brief comment will suffice. With respect to the exclusions of students attending out-of-state private schools and students attending schools for profit, there is nothing before us to indicate that there are such students who would otherwise come within the statute. We need not anticipate an attack on their behalf. Nor should we assume their exclusion could not be justified, or that, if it could not, the statute would fall on that account.

[10] With respect to students who travel beyond the 20 mile radius, we think it tenable to exclude them since the legislative purpose is to extend to the private school student the same benefit which is mandated for the student of his district who attends public school, and students who attend a private school beyond the 20-mile radius are on that account beyond the legislative purpose.[8] Nor did the exclusion become unreasonable when the statute was amended to provide a limit of $150 upon the cost of transporting one student. That limit was enacted to confine the benefit to students otherwise qualified because in some

---

[8] See n. 3, *supra*, with respect to the origin of the mileage limitation.

individual cases the cost of transporting a single student to a private school had proved absurdly high. The Legislature did not intend by the dollar limitation to enlarge the class of beneficiaries, and we see no reason to say that the Legislature must either enlarge the class or continue to require inordinate expenditurs for a single student.

[11, 12] We see no substance to the further claim that if a district transports handicapped children pursuant to *N. J. S. A.* 18A:46–23, it must transport all private students. There is nothing in the record to suggest that handicapped children are not a rational class for the purpose of transportation, so that all private school students must be treated on a par with the handicapped student. And with respect to the final proposition, that private school students who live in districts which transport children to vocational schools must on that account be given transportation, again the record is barren of proof that vocational school students may not rationally be deemed a separate class with respect to transportation.

The judgment is reversed and the matter remanded for the entry of judgment for defendants.

For reversal and remanded—Chief Justice WEINTRAUB and Justices JACOBS, FRANCIS, PROCTOR, HALL, SCHETTINO and MOUNTAIN—7.

For affirmance—None.

APPENDIX B

Opinion of the Superior Court of New Jersey Chancery Division–Morris County

110 N.J. Super. 234

West Morris Regional Board of Education, In the County of Morris, Jo Kotula, Robert T. Olsen and Susan Bacchus, Plaintiffs,

v.

Arthur J. Sills, Attorney General of the State of New Jersey, Carl L. Marburger, Commissioner of Education of the State of New Jersey, The New Jersey State Board of Education, Abram A. Vermeulen, Director Division of Budget and Accounting of the State of New Jersey, John A. Kervick, Treasurer of the State of New Jersey, Leslie P. Rear, Superintendent of Schools of Morris County, New Jersey and The Board of Education of the Township of Morris, Defendants.

Superior Court of New Jersey,
Chancery Division.

April 28, 1970.

Declaratory judgment action to determine constitutionality of school transportation law. The Superior Court, Chancery Division, Morris County, Joseph H. Stamler, J.S.C., held that school transportation law which requires school district to bus any pupil of non-profit, private school within school district if district transports any public school students, living remotely from school violated equal protection clauses of the Fourteenth Amendment and the New Jersey Constitution insofar as it discriminates against the private or parochial non-profit school pupils who reside in districts which provide no transportation to the public schools.

Judgment in accordance with opinion.

1. Constitutional Law 274

Schools and School Districts 8

Statute authorizing school district boards to provide for transportation of pupils to and from non-public schools, including parochial schools, and which placed $150 maximum for pupil assistance does not violate establishment clause of First Amendment as applied to the states by the Fourteenth Amendment. N.J.S.A. 18A:39-1; U.S.C.A. Const. Amends. 1, 14.

2. Constitutional Law 70(1)

While the judiciary is obligated to insure and protect constitutional rights, it must simultaneously acknowledge that the Legislature is a coordinate branch of government, and its views are entitled to measured attention and respect.

3. Constitutional Law 48

Legislative enactments are presumed to be constitutional and courts will strive to reach that decisional result.

4. Schools and School Districts 4

Education, including private and religious schools, is essentially a state supervised function.

5. Constitutional Law 85

Parents have a constitutional right to choose the type and character of education they feel is best suited for their children, be it secular or sectarian. N.J.S.A. 18A:38-25 et seq., 31, 18A:46-1, 23.

6. Constitutional Law 47

First inquiry in determination of a statute's constitutionality is as to the "purpose" of the particular measure and the objectives which the legislators might have had in enacting the statute.

7. Constitutional Law 48

Essential integrity of the legislative form of government is not to be impugned where a permisible purpose for an enactment is found.

8. Constitutional Law 211

Purposes of legislation and legitimacy of legislative classifications are properly subject to judicial inquiry when considering "equal protection" arguments raised against a particular statute. U.S.C.A. Const. Amend. 14.

9. Constitutional Law 48

One who attacks constitutionality of statute on ground that it violates equal protection of the laws clause of Fourteenth Amendment must overcome presumption of constitutionality of legislative classification and must carry heavy burden of showing that such clasifications are arbitrary. U.S.C.A. Const. Amend. 14.

10. Evidence 5(2)

Superior Court would take judicial notice that some New Jersey residents send their children to distant and remote areas out of New Jersey so that the children may attend non-public schools. N.J.S.A. 2A:39-1

11. Constitutional Law 211

Schools and School Districts 8

Exclusion of any student who attends schools outside of 20 mile radius from student's home from busing provided at public expense was reasonable and did not violate the

equal protection clauses of either the New Jersey or United States Constitution. N.J.S.A. 18A:39-1; U.S.C.A. Const. Amend. 14; Const. 1947, Art. I, par. 5.

12. Constitutional Law 211

Schools and School Districts 8

School transportation law which requires school district to bus any pupil of non-profit, private school within school district if district transports any public school students living remotely from school violated equal protection clauses of the Fourteenth Amendment and the New Jersey Constitution insofar as it discriminates against the private or parochial non-profit school pupils who reside in districts which provide no transportation to the public schools. Const. 1947, Art. VIII, § IV, pars. 2, 3; N.J.S.A. 18A:39-1.

13. Evidence 5(2)

Judicial notice would be taken of fact that the highly compact urban areas do not provide for public school pupil transportation and therefore are not required, under public busing law, to provide transportation to non-public school children. N.J.S.A. 18A:39-1.

Garret A. Hobart, IV, Morristown, for plaintiffs (Schenck, Price, Smith & King, Morristown, attorneys).

Virginia Long Annich, Deputy Atty. Gen., for defendants (Arthur J. Sills, Atty. Gen.)

Arnold Chait, Morristown, for defendant Morris Township Board of Education (Vogel, Chait & Wacks, Morristown, attorneys).

OPINION

STAMLER (JOSEPH H.), J. S. C.

Plaintiffs are West Morris Regional Board of Education, two duly elected members of that board and a taxpayer of the Township of Morris. Defendants are the Attorney General of New Jersey, the Commissioner of Education, the State Board of Education, the State Director of the Division of Budget and Accounting, the State Treasurer, the Superintendent of Schools of Morris County and the Morris Township Board of Education. Plaintiffs, seeking a declaratory judgment in accordance with the provisions of N.J.S.A. 2A:16-55 (Uniform Declaratory Judgment Act), asserts that N.J.S.A. 18A:39-1 is unconstitutional. Briefly stated, this latter statute requires school district, under appropriate circumstances, to transport children residing in the district to and from non-public, non-profit schools up to 20 miles distant from their place of residence.

Plaintiffs attack the validity of this statute, popularly referred to as the "new school busing law," on two basic grounds: (1) that the primary benefit of the legislation flows to institutions operated by religious orders and, therefore, tends to establish religion contrary to the First Amendment of the United States Constitution, and (2) assuming, *arguendo*, that the primary purpose of the legislation is "child benefit" and does not result in an Establishment Clause violation, plaintiffs contend that the classification of children benefited by this statute is arbitrary and discriminatory, and consequently violates the Equal Protection provisions of the Fourteenth Amendment of the United States Constitution. Defendants take the position that the statute is valid in all respects.

The questioned statute permits boards of education to provide for the transportation to and from school of pupils who reside "remote from any schoolhouse" and includes

therein transportation of both public school children and those who attend non-public, non-profit schools. However, the benefits of the statute for non-public school children *only* become operative if the district in the first instance transports public school children. This is the so-called "triggering" provision.

N.J.S.A. 18A:39-1 provides in pertinent parts as follows:

Whenever in any district there are pupils residing remote from any schoolhouse, the board of education of the district may make rules and contracts for the transportation of such pupils to and from school, including the transportation of school pupils to and from school other than a public school, except such schools as is operated for profit in whole or in part.

When any school district provides any transportation for public school pupils to and from school pursuant to this section, transportation shall be supplied to school pupils residing in such school district in going to and from any remote school other than a public school, not operated for profit in whole or in part, located within the State not more than 20 miles from the residence of the pupil provided the per pupil cost of the lowest bid received does not exceed $150.00 and *if such bid shall exceed said cost then the parent, guardian or other person having legal custody of the pupil shall be eligible to receive said amount toward the cost of his transportation* to a qualified school other than a public school, regardless of whether such transportation is along established public school routes.

* * * *

This section shall not require school districts to provide any transportation to pupils attending a school other than a public school where the only transportation presently provided by said district is for school children trans-

portated pursuant to chapter 46 of this Title [18A:46-1 et seq.] or for pupils transported to a vocational, technical or other public schools offering a specialized program. Any transportation to a school, other than a public school, shall be pursuant to the same rules and regulations promulgated by the State board as governs transportation to any public school. [Emphasis supplied]

If, in its discretion, the district determines that pupil transportation is advisable, then the district is reimbursed by the State to the extent of 75% of total cost "when the necessity for such transportation and the cost and method thereof have been approved by the county superintendent of the county in which the district paying the cost of such transportation is situate."- N.J.S.A. 18A:58-7.

After the present suit was commenced Judge Lora decided the case of *McCanna v. Sills*, 103 N.J. Super. 480, 247 A.2d 691 (Ch. Div. 1968), which decision upheld the constitutionality of the "busing statute" against an asserted violation of the Establishment Clause. Thereafter, Judge R. Cooper Brown reached the same conclusion in *Board of Education of Woodbury Heights v. Gateway Regional High School Dist.*, 104 N.J. Super. 76, 248 A.2d 564 (Law Div. 1968). No appeal was presented in either case. Plaintiffs here contend that these two trial court decisions are not binding upon this court, and this court is urged to reach the opposite result.

In the present case a stipulation of facts was filed and the parties brought the matter up for hearing on cross-motions for summary judgment. The stipulation in great part deals with legislative background. Judge Larner, in *Fox v. Board of Education*, 93 N.J. Super. 544, 226 A.2d 471 (Law Div. 1967), thoroughly detailed the history of the predecessor statute, R.S. 18:14-8, and what occurred

thereafter in the Legislature ruling up to the present statute is described in *McCanna, supra,* and *Woodbury, supra.* Repetition here of such legislative history would be superfluous.

It is important to note that, effective July 28, 1968, an amendment to the new statute limited the per pupil cost to $150. Therefore, the details of dollar expenditures under the statute prior to this amendment, referred to at length in the stipulation, are not pertinent to the issues now raised.

It was stipulated by the parties that 75% of the funds advanced by each school district is being reimbursed by the State to the districts, whether each district paid for busing or found it more expedient to make direct payments of up to $150 to parents or guardians.

The stipulation also reveals that as of April 1967 there were 363,560 students enrolled in the non-public schools of New Jersey from kindergarten through grade 12. Of this total, 332,519 students were attending schools conducted under the auspices of the Roman Catholic Church. Thus, 91.4% of all the non-public school pupils attended schools affiliated with the Roman Catholic Church. As of April 1967, 88,782 students, 26.6% of the Roman Catholic school pupils, lived two miles or more from the school they attended. Of that number, 69,656 were transported to school by bus.

In the West Morris Regional High School District, for the 1967-68 school year, a total of 429 private school students were transported. Of that number, 346 students were transported to parochial schools. Defendant Morris Township Board of Education buses 519 pupils to non-public schools.

In contrast to West Morris Regional and Morris Township is the Town of Morristown. The stipulation acknowledges:

> The Morristown Board of Education transported no public school students during the school year 1967-1968. It will transport no private and parochial students in the 1968-1969 school year because it provides no transportation for public school students.

It has been further stipulated that in many instances non-public school curricula include religious instruction and secetarian prayer.

[1] Attending to plaintiffs' first contention that the statute and its implementation violates the Establishment Clause of the First Amendment, this was fully argued in both *McCanna, supra* and *Woodbury, supra*, and this court adopts the conclusions of Judges Lora and Brown as they relate to the alleged Establishment Clause violation. In both cases the statute was held to be constitutional.

The second phase of plaintiffs' attack is that the statute constitutes a denial of equal protection of the law. It is urged that the classification of children to receive the statutory benefits is arbitrary and consequently in violation of the Fourteenth Amendment. This issue was specifically not raised in *McCanna, supra*. From the record before this court, it was not fully presented in *Woodbury, supra*.

Plaintiffs, addressing themselves to the equal protection question, state paradoxically that this statute does not go far enough, while at the same time, under the Establishment Clause argument, they say the statute goes too far. Plaintiffs assert that the operation of N.J.S.A. 18A:39-1 violates the Equal Protection Clause by reason of "under-

inclusion." Plaintiffs cite six categories of school children who are excluded from transportation by reason of the operation of the act, to wit: (1) New Jersey residents attending out-of-state schools; (2) students outside the 20-mile radius; (3) pupils attending profit-making private schools; (4) pupils living in districts which only transport handicapped children pursuant to N.J.S.A. 18A:46-23; (5) students living in districts which only provide transportation to children attending public vocational schools, and (6) private or parochial non-profit school pupils residing in a district which provides no transportation to its public schools. Plaintiffs maintain that, by reason of these exclusions, the challenged act denies equal protection to pupils in the excluded categories. If the health, welfare and safety of *all* school children in the State are the underlying motives for the statute, plaintiffs ask why *all* school children should not receive its protection and benefits, regardless of where they happen to live?

The United States Constitution, Amend. XIV, § 1 commands:

> No State shall * * * deny to any person within its jurisdiction the equal protection of the laws.

Its application is directed to many areas of governmental activity, including primarily state legislation. *Strauder v. West Virginia,* 100 U.S. 303, 25 L.Ed. 664 (1880).

[2, 3] While the judiciary is obligated to insure and protect constitutional rights, it must simultaneously acknowledge that the Legislature is a coordinate branch of government, and its views are entitled to measured attention and respect. It is well settled that legislative enactments are presumed to be constitutional, and courts will strive to reach that decisional result. See *In re Village of Loch*

Arbour, 25 N.J. 258, 264, 135 A.2d 663 (1967); *WHYY, Inc. v. Borough of Glassboro*, 50 N.J. 6, 13, 231 A.2d 608 (1967).

Judicial application of the equal protection clause acknowledges that states must regard some of its citizens under separate circumstances and special situations differently from others. In *Wilson v. City of Long Branch*, 27 N.J. 360, 142 A.2d 837 (1958), the court considered a statute alleged to be discriminatory as against private property owners and in favor of public utilities, contrary to the Fourteenth Amendment of the United States Constitution and Art. I, par. 5, of the New Jersey Constitution. There the court said:

> But the Legislature may classify different types of property owners and treat them differently without offending the fundamental law. The requirement of equal protection is satisfied if all persons within a class reasonably selected are treated alike. And a classification is reasonable if it rests upon some ground of difference having a real and substantial relation to the basic object of the particular enactment or on some relevant consideration of public policy. If there is a reasonable distinction, there is no oppressive discrimination. The Legislature has a wide range of discretion in this area and distinctions will be presumed to rest upon a rational basis if there be any conceivable state of facts which would afford reasonable support for them. *Robson v. Rodriquez*, 26 N.J. 517, 141 A.2d 1 (1958). [at 377, 142 A.2d at 846]

The court then concluded that public utilities were necessary adjuncts of the public welfare and that the Legislature should treat them differently from private property owners.

In *New Jersey Chapter, American Institute of Planners v. New Jersey State Board of Professional Planners,* 48 N.J. 581, 227 A.2d 313 (1967), the court reiterated that equal protection does *not* mean that regulation of a particular profession must serve to regulate a[ll] or none. The court said:

> The Legislature has wide discretion in the creation of or recognition of classes for different treatment. Equal protection does not require that all persons be dealt with identically. If there is some reasonable basis for the recognition of separate classes, and the disparate treatment of the classes has a rational relation to the object sought to be achieved by the lawmakers, the constitution is not offended. The transgression arises only when the classification rests upon grounds wholly irrelevant to achievement of the State's objective; the separate treatment must admit of but one conclusion beyond a rational doubt, *i.e.*, that the basis therefor is arbitrary and unreasonable, and without relevance to the legislative goal. [at 601, 227 A.2d at 323]

But the decision in the *Planners* case acknowledged that the judiciary has a duty to require into legislative acts and to include where separate treatment afforded in a statute represents invidious discriminations, or where different treatment has no rational basis in relation to the expressed purpose of the legislation. *Planners* makes a distinction between licensed professionals exempt from examination and those seeking to be licensed and made subject to examination. In *Wilson, supra,* the statutory classification involved a separation of public utilities and private property owners. In the case at bar the subjects of the classification under the "busing statute" are *all school children in New Jersey.*

[4, 5] Education in our State is essentially a state-supervised function, and this includes private schools as well as public, religious as well as secular. Our state school laws require that all children between the ages of 6 and 16 attend school, public or private, or at least obtain equivalent instruction. N.J.S.A. 18A:38-25 et seq. (This is compulsory for *all* children, except those whose mental or physical condition would impose a burden upon the child. But in such cases, an opportunity for special schooling and transportation is available. N.J.S.A. 18A:46-1, 23.) The Legislature has established it to be a *quasi*-criminal offense for parents to ignore this mandate (N.J.S.A. 18A:38-31), and a juvenile offense for a child to be truant (N.J.S.A. 18A:38-27). However, parents do have a constitutional right to choose the type and character of education they feel is best suited for their children, be it secular or sectarian. *Pierce v. Society of Sisters, etc.*, 268 U.S. 510, 45 S. Ct. 571, 69 L.Ed. 1070 (1925).

[6-8] The first inquiry in the determination of a statute's constitutionality is as to the "purpose" of the particular measure. What are the objectives which the legislators might have had in enacting the statute? The essential integrity of the legislative arm of government is not to be impugned where a permissible purpose for the enactment is found. Although in *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S. Ct. 1064, 30 L.Ed. 220 (1886), the questioned statute was held unconstitutional "because of unequal administration rather than unequal on its face," the Supreme Court did say, by way of dictum, that the Equal Protection Clause demanded not only equal application of a law according to its terms, but also "the protection of equal laws." 118 U.S., at 369, 6 S. Ct. 1064. This proposition has been frequently sited and quoted with approval; e.g., *Hines v. Davidowitz*, 312 U.S. 52, 69, 61 S. Ct. 399, 85

L.Ed. 581 (1941); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541, 62 S. Ct. 1110, 86 L.Ed. 1655 (1942). It is abundantly clear that the purposes of the legislation and the legitimacy of legislative classifications are properly subject to judicial inquiry when considering equal protection arguments raised against a particular statute.

In *Everson v. Board of Education, Ewing Tp.*, 133 N.J.L. 350, 44 A.2d 333 (E. & A. 1945), affirmed 330 U.S. 1, 67 S. Ct. 504, 91 L.Ed. 711 (1947), it was held that extending transportation benefits to non-public school students did not transgress the Establishment Clause of the First Amendment. Both the New Jersey Court of Errors and Appeals and the United States Supreme Court based their conclusions on a finding that the primary purpose of the legislation was "child benefit." In *Fox, supra*, Judge Larner determined that the local school board did *not* have the power to transport children to non-public schools along independent routes, for such discretion was not authorized in the then existing legislation. 93 N.J. Super., at 565-566, 226 A.2d 471 The court there held that this result was ineluctable, notwithstanding the incorporation of the *Everson* doctrine into the New Jersey Constitution (Art. VIII, § IV, par. 3) and the acknowledgement in the *Fox* decision that no state funds were sought for or used in the proposed plans for transportation.

Judge Brown noted in *Woodbury, supra*, that the Legislature expanded the scope of the earlier legislation when it enacted the current statute, N.J.S.A. 18A:39-1. The revised law was intended to accomplish by legislative act that which Judge Larner had refused to do judicially in the *Fox* decision. Under the new statute, non-public school transportation is not limited to only established public school bus routes. *Woodbury, supra*, 104 N.J. Super., at 84, 248 A.2d 564.

The decision in *Woodbury* also dealt with the federal Equal Protection Clause as applied to N.J.S.A. 18A:39-1. Although not raised specifically by the complaint, the plaintiff in *Woodbury* did allege that the statute resulted in an unconstitutional classification of pupils with respect to the benefits available under the law. Judge Brown dismissed this attack and, under the facts there presented as outlined in his opinion, held that all similarly situated students were treated equally under the statute, according to a "remoteness criteria." 104 N.J. Super., at 85-86, 248 A.2d 564.

But this does not answer the equal protection arguments raised in the present case. Here, the contention, in part, is that payments are made from public funds to some private school pupils who live remote from their schools to the exclusion of other private school pupils who also live remote and are similarly situated, except insofar as those pupils in the first group live in districts which happen to provide school transportation to their public school pupils, while those in the second category reside in districts which provide no such public school transportation. It would seem that the statute here in question leads to a paradoxical result, especially where, according to defendants, "*the object of a school transportation law is to provide a general overall program for seeing that all children get to the school of their choice safely* * * *". (Defendant's brief; emphasis supplied)

[9] Plaintiffs, who assail the statute, must overcome the presumption of constitutionality of legislative classifications and must carry the heavy burden of showing such classifications to be arbitrary. In *David v. Vesta Co.*, 45 N.J. 301, 212 A.2d 345 (1965), the court said:

> The constitutionality of a legislative classification is presumed, and one who assails the classification must carry the burden of showing its arbitrariness. A classification having some reasonable basis is not invalid merely because it is not made with mathematical nicety or because in practice it results in some inequality. And the classification must be upheld if any set of facts can reasonably be conceived to support it. In short, the equal protection clause forbids only invidious discrimination. [Citing cases; at 315, 212 A.2d at 352].

In *Rinaldi v. Yeager*, 384 U.S. 305, 86 S. Ct. 1497, 16 L.Ed.2d 577 (1966), the U.S. Supreme Court considered a New Jersey statute which required those imprisoned to pay for their trial transcripts, while permitting the guilty who were fortunate to receive only a fine, probation or suspended sentence in lieu of imprisonment not to be so obligated. In holding the statute to be unconstitutional Mr. Justice Stewart, speaking for the court, said:

> The Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes. [Citing case] It also imposed a requirement of some rationality in the nature of the class singled out. To be sure the constitutional demand is not a demand that a statute necessarily apply equally to all persons. 'The Constitution does not require things which are different in fact * * * to be treated in law as though they were the same.' [Citing case] Hence, legislation may impose special burdens upon defined classes in order to achieve permissible ends. But the Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn have 'some relevance to the purpose for which the classification is made.' [Citing cases; at 308-309, 86 S. Ct. at 1499]

The equal protection issue in the present case resolves itself to whether or not the school children who fall under this statute's separation are treated differently, although they are similarly situated except as to where each happens to live within the State. If such children are subject to different classifications (and therefore, different benefits) by the statute, the question then becomes whether there is some relevant and constitutionally permissible purpose for which such classifications are made.

Brought into sharp focus is not only the Equal Protection Clause of the 14th Amendment, but also three vitally relevant sections of our New Jersey State Constitution. Art. I, par. 5, of the New Jersey Constitution contains an equal protection clause whose language differs from that in the United States Constitution. Although the phrases differ, this clause has been held to mean that equality of right is fundamental, as in the United States Constitution, and both clauses forbid "class legislation" which arbitrarily discriminates against some and favors others in like circumstances. *Washington National Ins. Co. v. Board of Review, etc.*, 1 N.J. 545, 64 A.2d 443 (1949).

Aftre describing the perpetual fund established for support of free public schools, its use is limited by the New Jersey Constitution as follows:

> • • • the income thereof • • • shall be annually appropriated to the support of free public schools, *for the equal benefit of all the people of the State;* • • • [Art. VIII, § IV, par. 2; emphasis supplied]

The New Jersey Constitution, Art. VIII, § IV, par. 3, further provides:

> The Legislature may, ***within reasonable limitations as to distance*** to be prescribed, provide for the transportation of children within the ages of five to eighteen years inclusive to and from ***any*** school. [Emphasis supplied]

[10] Examining the "under-included" categories set forth in plaintiffs' argument, the first category of "New Jersey residents attending out-of-state schools" results only in the exclusion of students who are not "similarly situated" to those benefited. No proof has been offered by plaintiffs and the stipulation does not acknowledge the existence of any students within this classification. However, the court will judicially note that some residents send their children to far distant, truly remote areas out of State, so that they may attend non-public schools. Their "safety" in going to and from school is not advanced by the statute here in question, since they are excluded by its very terms. However, this limitation is found to be permisible.

[11] "Students going to schools outside the 20-mile radius" (the second category) are not required to be included, for the New Jersey Constitution (Art. VIII, § IV, par. 3) specifically permits the determination of "reasonable limitations as to distance" by the Legislature with respect to school transportation. It is not for this court to usurp legislative discretion by recommending a greater or lesser distance. This exclusion does not offend either the New Jersey Constitution or the United States Constitution, because the legislative classification is found to be valid. Also, no showing was made before this court that any such exclusion results in real and invidious harm.

As to the third category of "pupils attending profit-making private schools," the record made by plaintiffs is also deficient. The court's attention has not been directed by

the parties to a single "profit-making private school" operating in New Jersey, nor to any students attending such schools who are denied the benefits of this statute. The burden of proving that this category of alleged "under-inclusion" is truly existent and discriminatory has not been maintained.

Categories (4) and (5) are composed of children who live in districts where only handicapped and vocational school children are to be transported. Here, the "triggering action" of the statute is unaffected by such transportation, in that transportation of handicapped or vocational school children does not necessitate the transportation of non-public school children. Such children are in specialized schools for specialized needs and obviously are not within the same classification as those who attend the required daily classes at regular elementary and secondary schools in our State, be they public or parochial. Therefore, these two cases of classifications which allegedly result in "under-inclusion" are held to be constitutionally valid.

The troublesome category is the sixth: "private or parochial non-profit school pupils residing in districts which provide no transportation to their public school pupils." Here, plaintiffs' contentions as to "under-inclusion" are supported by ample proofs in the stipulation.

For example, Morris Township and Morristown are divided in one area by South Street. Morris Township has determined, in its discretion, to transport public school children, and therefore it *must* provide (subject to statutory limitations) for non-public school children who reside in the district but who go to and from non-public schools outside the district. In contrast, Morristown does not provide any transportation for public school students, and therefore it need not under the statute provide for

non-public school students. It is obvious that non-public school students might receive transportation under the statute's terms in one instance, while being denied such aid in a second instance, depending on which side of the same street their families happen to reside! Such geographical division is not unique in our State. For example, Millburn and Summit are separated by a single roadway, and Millburn has opted to transport public school students while Summit has not. In like manner are Verona and West Orange, and other examples are apparent.

If students A and B reside as neighbors in Morris Township and students C and D live directly across the street in Morristown, the inequality of treatment has become apparent when hypothetical situations as to schools attended are examined. If A and C are pupils at Newark Academy (secular) and B and D attend St. Benedicts Academy or Delbarton School (parochial, when the description is used loosely), A and B will be transported whereas C and D will not. Morristown cannot under this statute be obligated to transport non-public school students (pupils C and D) if in its discretion it has determined that transportation of public school students is unnecessary. Nor can this court question the need or obligate Morristown to expend moneys for busing "public school students," so that pupils C and D can receive treatment equal to pupils A and B. Morristown and Morris Township, each with its separate municipal problems, are respectively entitled by statute to use discretion in determining the need to provide transportation for public school children.

What cannot be ignored is the contribution of state funds (75% of cost) to A and B and not to C and D, who may be equally, if not more, in need of the assistance com-

pared to A and B. To all in the position of A and B there is annually paid, albeit indirectly, up to $150 per pupil, of which up to $112.50 comes from a special, limited use trust fund. N.J. Const., Art. VIII, § IV, par. 2, C and D and others similarly situated receive nothing towards their school transportation. If the primary purpose of the statute is "child benefit and safety," as the State here contends and as agreed by the United States Supreme Court in *Everson, supra,* and as reiterated in the New Jersey Constitution (Art. VIII, § IV, par. 3, are not C and D deprived of the equal protection guaranteed to them under both the United States Constitution and our own New Jersey Constitution?

Both N.J.S.A. 18A:39-1 and 18A:58-7 must be examined as to the effect of their interaction, one upon the other. If it is fairly concluded that, in the present case, certain school children are similarly situated except for geographical or municipal boundary lines, the extension of benefits or rights to some results, at least by implication if not by operation, in an unconstitutional denial to others, especially in view of the use of state funds to support such benefits.

In *Shelley v. Kraemer,* 334 U.S. 1, 68 S. Ct. 836, 92 L.Ed. 1161 (1948), the court, in dealing with restrictive racial covenants, said:

> Equal protection of the laws is not achieved through indiscriminate impositions of unequalities. [at 22, 68 S. Ct. at 846]

Cannot the same be said of the indiscriminate granting of school transportation benefits? Unless a truly relevant distinction can be made between those school children benefited and those deprived under this statute, school

children similarly situated should not be treated differently. The geographical accident of the location of their homes in a non-busing community is not a relevant distinction on which statutory classifications can be validly established. The New Jersey Constitution permits the Legislature, "within reasonable limitations as to distance," to provide for the transportation of children within the ages of 5 to 18 years, inclusive, to and from *any* school. Once having availed itself of this permission in the Constitution, the Legislature's power of statutory classification or discrimination is limited to "distance" only and does not extend to excluding or including any particular children, their places of residence or particular schools, unless such classification was within the permissible "distance zone" regulatory power.

Whatever is right or wrong for A and B must be right or wrong for C and D, unless some relevant difference can be shown to exist between A and B on the one hand and C and D on the other to justify different treatment under the statute.

[12] It is concluded that the equal protection provisions of the United States Constitution are violated. Although not raised by counsel, but brought sharply into focus by Judge Larner's opinion in *Fox, supra*, this court must also consider the statute and its relation to the New Jersey Constitution, Art. VIII, § IV, pars. 2 and 3. Judge Larner concluded in *Fox* that, under the statute which was the predecessor of the one here in question, public funds could not be used to establish and pay for bus routes designed solely for non-public school children. The statute under consideration in *Fox* spoke of an "established school route" as the statutory "triggering" provision. The statute *sub judice* was obviously intended to override the decision

by Judge Larner. However, it still must be examined with constitutional limitations in view.

Here, unlike the statute considered in *Fox*, state school funds are to be used for the transportation authorized by the current statute. School funds must be used "for the equal benefit of all the people of the State." N.J. Const., Art. VIII, § IV, par. 2. It is obvious that the 75% contribution from state funds to some non-public school students, and not to others similarly situated, violates this section. This burden should be on the defendants to show not only that the objectives of the statute could not be attained by measures which did not discriminate, but also that a solution which partially solves a public problem outweighs any resulting harm that will be suffered by certain excluded private parties. Once state monies have been expended for a special class (here, private school students attending schools outside the district who reside in districts where public school students are transported) to the exclusion of another class (here, private school students attending the same schools outside the district who reside in districts where no public school students are transported), the classification becomes suspect of constitutional invalidity.

[13] It cannot be found here that special benefits to children who happen to be included under the present statute are based upon special needs. Hereinabove, it was noted that the Morristown-Morris Township geographical relationship was not unique in this State. Judicial notice can be taken of the fact that, for the most part in our State, the highly compact urban areas do not provide for public school pupil transportation and therefore do not have to provide transportation to non-public school children. The parish school children in the elementary grades living in

most urban areas would advance to sectarian high schools located outside the parish area, and no transportation would be provided. It is recognized that these compact urban communities are characterized by a below-average economic level. If the statute in question makes its classification on economic need, it is not supported by any facts before this court. As a matter of fact, the statute as now constituted operates to deprive just those non-public school children who are most in need of financial assistance (*e.g.*, urban area dwellers).

The suburban communities, where public school transportation is more common, may be characterized as being above the general economic level of the urban areas. It would seem apparent that many of those who can afford to live in "suburbia" (where distance between homes on large lots meets the "remote" criterion) are in a better economic position to finance their children's private school transportation than are most residents of the cities today. Since most cities do little school busing because of the close proximity of "neighborhood schools," it is the poorer non-public school children against whom this statute serves to discriminate. The result is unconstitutional under the present statutory scheme, notwithstanding that the Legislature may have had the best intentions.

If this statute is based upon the laudable legislative purpose of seeing that all children get to the school of their choice safely, what makes C and D of Morristown or a child in Newark more capable of walking the streets with safety than the Morris Township or Millburn children who are transported at public expense to non-public schools and whose parents would be better able for the most part to afford the transportation than the Morristown or Newarks child's parents?

The statute in question, N.J.S.A. 18A:39-1, is declared to be violative of the Fourteenth Amendment of the United States Constitution. It is also concluded that the statute violates the New Jersey Constitution, Art. VIII, § IV, par. 3, wherein the statute extends its discriminatory features beyond the permitted "reasonable limitations as to distance." The statute, by discriminating between children and using public funds inequitably, also offends the constitutional proscription that the funds, or income therefrom, shall be used "for the equal benefit of all the people of the State." N.J. Const. Art. VIII, § IV, par. 2.

APPENDIX C

Order of Judgment
(Filed May 5, 1970)

THIS MATTER, being opened to the Court by Schenck, Price, Smith & King, Attorneys for the Plaintiffs (Garret A. Hobart, IV, Esquire appearing) in the presence of Mr. George F. Kugler, Jr., Esquire, Attorney General of New Jersey (Mrs. Virginia Long Annich, Deputy Attorney General appearing), Attorney for the Defendants, Arthur J. Sills, Pro Se, Carl L. Marburger, The New Jersey State Board of Education, Abram A. Vermeulen, John A. Kervick, Leslie P. Rear, and Vogel, Chait & Weeks (Arnold Chait, Esquire appearing), Attorneys for the Defendant, Morris Township Board of Education, and the Court having studied the Stipulation of Facts submitted by the parties, and the Exhibits submitted in connection therewith, and having read the Briefs of counsel, and having heard oral argument, and for good cause shown;

IT IS, on this 5th day of May, 1970 ORDERED AND ADJUDGED, by way of Declaratory Judgment, that *N.J.S.A.* 18A:39-1 is declared to violate the equal protection clause of the Fourteenth Amendment of the United States Constitution, and is further declared to violate Article VIII, Section 4, Paragraph 3 of the New Jersey Constitution for the reasons enumerated in the written opinion of the Court dated April 28, 1970 which is hereby incorporated herein by reference; and

IT IS FURTHER ORDERED that Plaintiff, West Morris Regional Board of Education, be relieved of the obligation for transportation of private school students as required by *R.S.* 18A:39-1 *et seq.*, and

IT IS FURTHER ORDERED that the Defendants, and each of them, be and they are hereby restrained and en-

joined from administering, enforcing, or expending funds pursuant to *R.S.* 18A:39-1 *es seq.* insofar as the said Statute directs them to administer, enforce or pay for the transportation of private school students, and

IT IS FURTHER ORDERED upon the representation of defendants that a notice of appeal will be filed forthwith, the above restraints be and the same are hereby stayed until the determination of the appellate court and the handing down of the mandate, provided however, that nothing contained herein shall be deemed to toll or otherwise stay the time for taking an appeal from the within judgment.

/s/ Joseph H. Stamler
J. S. C.

LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

Supreme Court, U.S.
FILED
OCT 26 1971
E. ROBERT SEAVER, CLERK

No. 71-420

WEST MORRIS REGIONAL BOARD OF EDUCATION
a municipal corporation of the State of New Jersey,

Petitioners,

vs.

ARTHUR J. SILLS, Attorney General of the State of New Jersey, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION

GEORGE F. KUGLER, JR.,
Attorney General of New Jersey,
Attorney for Respondents,
State House Annex,
Trenton, New Jersey 08625

STEPHEN SKILLMAN,
Assistant Attorney General,
Of Counsel.

VIRGINIA LONG ANNICH,
Deputy Attorney General,
On the Brief.

TABLE OF CONTENTS

	PAGE
COUNTER-STATEMENT OF QUESTIONS PRESENTED	1
COUNTER-STATEMENT OF THE CASE	2
ARGUMENT:	
Point I—N.J.S.A. 18A:39-1 which provides for the transportation of children to nonpublic schools is consistent with the Establishment Clause of the First Amendment	3
Point II—N.J.S.A. 18A:39-1 does not violate the Equal Protection Clause of the Fourteenth Amendment by requiring that nonpublic school children be transported only in districts which must transport public school children since the result of that scheme is that all children similarly situated within a district are treated equally	8
CONCLUSION	11

Cases Cited

Americans United for Separation of Church and State v. Independent School District No. 622, —— U. S. ——, 91 S. Ct. 2275, 29 L. Ed. 2d 854 (1971)	8
Board of Education of Central School Dist. No. I v. Allen, 392 U. S. 236 (1968)	5-7
Dandridge v. Williams, 397 U. S. 471 (1970)	11
Everson v. Board of Education of Ewing Township, 330 U. S. 1	3-8

PAGE

Lemon v. Kurtzman, 403 U. S. ——, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971) 7

Tilton v. Richardson, 403 U. S. ——, 91 S. Ct. 2091, 29 L. Ed. 2d 790 (1971) 7, 8

Walz v. Tax Commission, 397 U. S. 644 (1970) 6, 7

West Morris Reg. Bd. of Ed., et al. v. Sills, et al., 58 N. J. 464, 476 (1971) 10, 11

Williamson v. Lee Optical of Oklahoma, 348 U. S. 483 (1955) 10

United States Constitution Cited

First Amendment 1-3, 7, 8

Fourteenth Amendment 2, 8

Statutes Cited

L. 1894, c. 335, §22 3

L. 1902, c. 36, §111 3

L.L. 1903, Special Session, c. 1, §117 3

L. 1941, c. 191, §1 3

L. 1967, c. 64 9

L. 1967, c. 73 4

N.J.S.A. 18A:39-1 ..... 2-4, 6-8

R.S. 18:14-8 ..... 3, 4, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 420

WEST MORRIS REGIONAL BOARD OF EDUCATION
a municipal corporation of the State of New Jersey,

Petitioners,

vs.

ARTHUR J. SILLS, Attorney General of the State of New Jersey, *et al.,*

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

Counter-Statement of Questions Presented

1. Does a statute, having the valid aim of providing a general program to help parents get their children, regardless of religion, safely and expeditiously to and from accredited schools, violate the First Amendment to the United States Constitution?

2. Does a statute which provides transportation only to private school students who reside in districts which must furnish transportation to public schools violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

Counter-Statement of the Case

Petitioners have challenged the provisions of N.J.S.A. 18A:39-1, which require that school districts which transport public school students also must transport children residing in those districts to nonpublic, nonprofit schools up to twenty miles distant from their place of residence. It is urged that the expenditure of public funds for this purpose constitutes a violation of the Establishment Clause of the First Amendment and that the classifications embodied in the statute violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

On June 25, 1971, the New Jersey Supreme Court declared that N.J.S.A. 18A:39-1 is neither violative of the First Amendment nor the Fourteenth Amendment to the United States Constitution, nor in conflict with any provision of the New Jersey Constitution. On September 23, 1971, petitioners filed a petition with this Court for a writ of certiorari.

ARGUMENT

POINT I

N.J.S.A. 18A:39-1 which provides for the transportation of children to nonpublic schools is consistent with the Establishment Clause of the First Amendment.

The first pupil transportation law in New Jersey was enacted in 1894 and gave boards of education discretion to provide transportation for children living remote from the public schoolhouse, and to levy a special tax for such purpose (L. 1894, c. 335, §22). This statute was carried over in the school law revisions of 1902 and 1903 and remained basically the same until 1941. L. 1902, c. 36, §111; L. 1903, Special Session, c. 1, §117. Up to this point, the statute was concerned solely with transportation to the public school.

The statutory scheme was changed by a 1941 amendment which expanded the coverage of the law to include not only transportation for public school children but "the transportation of school children to and from schools other than a public school, except such school as is operated for profit in whole or in part". L. 1941, c. 191, §1. The provision for the transportation of nonpublic school children was limited to *established school bus routes* (R.S. 18:14-8).

In 1947, this Court decided *Everson* v. *Board of Education of Ewing Township,* 330 U. S. 1, which held that R.S. 18:14-8 was not violative of the Establishment Clause of the First Amendment to the United States Constitution. In characterizing the progenitor of the statute at issue here as having the valid secular legislative aim

of providing "a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools" (330 U. S. at 18), this Court first articulated the primary purpose test, i.e., that in order to withstand the strictures of the Establishment Clause an enactment must have a secular legislative purpose and a primary effect that neither advances nor inhibits religion. Applying this test to R.S. 18:14-8, the Court found it to be a valid exercise of the legislative function in Establishment Clause terms:

> "Measured by these standards, we cannot say that the First Amendment prohibits New Jersey from spending tax raised funds to pay the bus fares of parochial school pupils as part of a general program under which it pays the fares of pupils attending public and other schools." 330 U. S. at 17.

Twenty years later, chapter 73 of the Laws of 1967 was enacted, which removed the requirement of "established school routes" from the New Jersey transportation law. It is this act which the petitioner seeks to have the Court review.

The prior decisions of this Court leave no doubt that the differences between the statute upheld in *Everson* and N.J.S.A. 18A:39-1 are lacking in constitutional significance. But petitioners approach the *Everson* decision in terms of a statement in the Court's opinion that the statute upheld in that case "approached the verge" of the State's constitutional power. 330 U. S. at 16. They imply from this language that if the present act goes even a degree further than its progenitor, it will fall outside of the scope of the *Everson* rationale. Specifically, they attack the elimination of the "established school routes" requirement as an indication that the Legislature intended

religious school students to be granted greater benefits than those available to public schoolers. An analysis of each law shows, however, that both were designed to provide nonpublic school children within a district with the same safe transportation that is made available to public schoolers—no more and no less. The only difference is that the new law extends this benefit to all children living within a district which buses public school children, subject to a few limited exceptions, rather than allowing the availability of the benefit to turn or whether a private school student happens to live along an established school bus route.

But, even if the present law could be considered more expansive than the act upheld in *Everson,* it still would come within the rationale of that case. In this regard, this court has repeatedly indicated that nonpublic school busing is a generally permissible activity and that its validity does not turn on rigorous conformity in every detail with the specific of the *Everson* program. In upholding New York's textbook loan law in *Board of Education of Central School Dist. No. I* v. *Allen,* 392 U. S. 236 (1968) the Court tested the validity of the New York program against what it apparently considered the clearly valid concept of providing assistance to parents of private school children for busing.

> "Of course books are different from buses. Most bus rides have no inherent religious significance, while religious books are common." 392 U. S. at 244.

The concurring and dissenting opinion expressed a similar theme:

> "In this sense it is not difficult to distinguish books which are the heart of any school from bus fares

> which provide a convenient and helpful public transportation service. With respect to the former, state financial support actively and directly assists the teaching and propagation of sectarian religious viewpoints in clear conflict with the First Amendment's establishment bar; with respect to the latter, the State merely provides a general and nondiscriminatory transportation service in no way related to substantive religious views and beliefs." 392 U. S. at 253. (Concurring opinion, Justice Black).
>
> "Whatever may be said of Everson, there is nothing ideological about a bus." 392 U. S. at 257 (Dissenting opinion, Justice Douglas).

In *Walz* v. *Tax Commission,* 397 U. S. 644 (1970), the Chief Justice assayed that in *Everson* the Court "had no difficulty in upholding reimbursement of bus fares of parochial school students". 397 U. S. at 670. Nothing in *Everson, Allen* or *Walz* even suggests that the validity of assistance for transportation of private school children turns upon whether the transportation is along "established school routes". Yet this is the only conceivable distinction between the present case and *Everson.*

Petitioners further urge that since the majority of students who obtain transportation benefits under N.J.S.A. 18A:39-1 attend religiously affiliated schools, that act unconstitutionally advances religion and falls outside the scope of *Everson.* But, it is clear that the Establishment Clause is not contravened by an enactment merely because religion or religiously affiliated institutions happen to derive some incidental benefit or suffer detriment from it. Thus, in *Everson,* this Court upheld a nonpublic school bus transportation program which involved busing only

to parochial schools even though it recognized that "children are helped to get to church schools" and that "some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets". 330 U. S. at 17. Similarly, in *Board of Education* v. *Allen, supra,* this Court acknowledged that "[p]erhaps free books make it more likely that some children will choose to attend a sectarian school". 392 U. S. at 244. But, as this Court observed in *Allen,* such an effect "does not alone demonstrate an unconstitutional degree of support for a religious institution". 392 U. S. at 244. And, it will not render the act in question invalid so long as the program generates the required neutral primary effect. Here, the primary purpose of N.J.S.A. 18A:39-1 is the valid secular aim of helping children get to school safely, without regard to the nature of the school attended. This being so, whatever benefit accrues to a religiously affiliated school is incidental to that legitimate secular goal. As such, it can have no effect on the validity of the act in terms of the First Amendment.

Petitioners have also suggested that the recent decision of this Court in *Lemon* v. *Kurtzman,* 403 U. S. ——, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971) has raised questions as to the continuing viability of *Everson.* But nothing in *Lemon* or in *Tilton* v. *Richardson,* 403 U. S. ——, 91 S. Ct. 2091, 29 L. Ed. 2d 790 (1971) has undercut either the *Walz* view of *Everson,* or that decision itself. In fact, the opinions in *Lemon* and *Tilton* specifically cite *Everson,* thereby tacitly reaffirming its validity. Furthermore, on the same day *Lemon* and *Tilton* were decided, the Court dismissed for lack of a substantial federal question a challenge to a Minnesota school busing statute which was remarkably similar to the New Jersey law.

Americans United for Separation of Church and State v. *Independent School District No. 622*, —— U. S. ——, 91 S. Ct. 2275, 29 L. Ed. 2d 854 (1971). Finally, it is clear that petitioners' interpretation of the "political divisiveness" reference in *Lemon* is inaccurate. To accept such a literal and expansive view of the Chief Justice's point in that case would necessarily invalidate all aid to persons attending nonpublic schools (including text book loan, and building aid) on the basis of its potential for political controversy. Such a result is obviously not the fair import of that case or the Court's decision in *Tilton* v. *Richardson, supra,* upholding the constitutionality of building construction aid to church related colleges, which decision clearly demonstrates that "political divisiveness" is only one factor to be considered in determining the validity of an enactment in First Amendment terms. Thus, it must be concluded that no recent expression of this Court in any way points to a limitation of *Everson* or even a desire to analyze it anew. Accordingly, that decision should be considered dispositive of the validity of N.J.S.A. 18A:39-1 within the meaning of the Establishment Clause of the First Amendment.

POINT II

N.J.S.A. 18A:39-1 does not violate the Equal Protection Clause of the Fourteenth Amendment by requiring that nonpublic school children be transported only in districts which must transport public school children since the result of that scheme is that all children similarly situated within a district are treated equally.

The thrust of N.J.S.A. 18A:39-1 is basically this: where in a school district there are public school children who live remote from school (2.5 miles or more from grades

9-12; 2 miles or more from grades K-8) they must be transported by the board of education; and in districts in which such mandatory public school transportation is afforded, transportation *must* be supplied to remote nonpublic school students. Thus, the private school student will or will not receive transportation depending on the district of his residence.

This "triggering" device evolved out of the old law which required transportation of nonpublic school students only "along established school routes" (R.S. 18:14-8). The philosophy behind the two statutes is the same: to give to nonpublic school students what is given to public school students who reside in the same district, no more and no less. Under the old law nonpublic school children were only bused along routes that were already being used to bus to public schools. With the "triggering" device introduced by chapter 64 of the Laws of 1967, nonpublic schoolers only receive transportation if public schoolers in a district do. Thus, the new law is in this respect an extension of the old. The "trigger", like the "established school routes" requirement, is basically an equal protection formula designed to require local boards of education to treat similarly situated persons equally: to wit, all children within the district remote from their schools regardless of whether those schools are public or not.

Petitioners contend that if child benefit through safe transportation to and from school is the aim of the enactment, there is no rational basis for conferring the benefit on some private school students and not on others. At the outset, as was noted by the New Jersey Supreme Court, if all private school students must be treated as a single class without regard to residence:

> "It is remarkable that it escaped counsel and the Court in *Everson.* The statute, then as now, lim-

> ited the benefit to private school students who lived in districts which furnished transportation to public school students, and indeed the statute there differentiated between private school students even within a single district, extending its benefits only to those who used the public school route." *West Morris Reg. Bd. of Ed., et al.* v. *Sills, et al.*, 58 N. J. 464, 476 (1971).

Although petitioners frame it this way, the question is not whether the Legislature could have gone further and ordered transportation for all remote private school students. For the Legislature may choose from among rational objectives and is not prohibited from utilizing a classification so long as a reasonable theory may be conceived of to support it. *Williamson* v. *Lee Optical of Oklahoma,* 348 U. S. 483 (1955).

Here, the logical extension of petitioners' argument would have grave ramifications. On the simplest level, to require a school district which did no transporting of public school children to transport nonpublic school children would require the taxpayers in the local school district to raise 25% of the transportation costs, to be used solely for the advantage of nonpublic school students, to the complete exclusion of the public school students (75% State funds are matched by local initiative). Additionally, the local district would be required to institute and fund administratively through tax revenues a program to provide the transportation to the private school children. This would constitute a considerable administrative burden, including, among other things, management of driver personnel, formulation of school bus routes, fiscal control, the acceptance of bids, and the letting of contracts, all for the exclusive benefit of private school children. In this

respect, the New Jersey Supreme Court noted that petitioners' thesis that the Legislature may take no step unless it goes the whole distance which constitutionally could be travelled, is not viable:

> ". . . when the subject involves the expenditure of public moneys. The competing demands are such that modest objectives must be allowed even though more pervasive ones would be welcome. So long as the limited objective is not invidious in design or effect, a statute may not be invalidated merely because it would also be reasonable to do more." 58 N. J. at 481.

Thus, the Legislature extended transportation to the private school student on the same basis as it would have been available if he attended public school in his district. There is nothing arbitrary or irrational in this concept. *Dandridge* v. *Williams,* 397 U. S. 471 (1970).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

George F. Kugler, Jr.,
Attorney General of New Jersey,
Attorney for Respondents.

Stephen Skillman,
Assistant Attorney General,
Of Counsel.

Virginia Long Annich,
Deputy Attorney General,
On the Brief.